Anthony bin Lojuta v Clarence Sipain @ Clarence Mojingol & Ors

HIGH COURT (KOTA KINABALU) — CIVIL CASE NO BKI-22NCvC-89/10 OF 2014
RAVINTHRAN J
4 APRIL 2016

Land Law — Sale of land — Fraud alleged — Land owner's thumbprint affixed on memorandum of transfer — Owner allegedly affixed thumbprint on blank paper after being told by nephew that there was party interested on land — Whether owner lost land through fraud or fraudulent misrepresentation or negligent misrepresentation — Whether new title indefeasible — Whether there was failure of consideration — Land Ordinance (Cap 68) s 97

The plaintiff alleged that his land was transferred to the first defendant through fraud, void instrument and fraudulent misrepresentation. The fourth defendant who was a lawyer was the brother of the first defendant. The second and third defendants are intermediaries in the sale and purchase transaction. The plaintiff also pleaded that there was failure of consideration as the first defendant did not pay the alleged purchase price. The plaintiff also pleaded negligence against the fifth defendant who purported to attest his thumbprint on the memorandum of transfer. The sixth defendant was sued because he was the employer of the fifth defendant. The seventh defendant was sued because of the prayer for re-transfer of the land. The plaintiff testified that he did not affix his thumbprint on any memorandum of transfer. In August of 2013, his nephew, the second defendant, told him that Tan Sri Richard Malanjum with whom he was acquainted wanted to buy his land. He gave the title deed to the second defendant with the instruction not to release it until the full purchase price was paid. On the same day, the second defendant asked him to affix his right thumbprint on a blank document and said that it was for the purpose of transmitting the deposit payment into his account. The plaintiff agreed because he was told that the buyer was Tan Sri Richard Malanjum. The plaintiff told the second defendant not to sell the land for any price below RM1.65m. Later he discovered that only RM50,000 had been deposited into his account. He also discovered that the land had been transferred to Clarence Sipain. At the same time he was unable to contact his nephew, the second defendant. The plaintiff lodged a police report to complain that he had been defrauded and cheated. He lodged a caveat two days later. In the present action, the issues that arose were whether the plaintiff lost his land through fraud or fraudulent misrepresentation or negligent misrepresentation; whether Clarence Sipain's title was indefeasible; and whether, in the alternative, there was failure of consideration on the part of Clarence Sipain?

Held:

(1) The plaintiff's evidence that he did not place his right thumbprint on a printed memorandum of transfer form in the instant case was credible. The defence of non est factum was not applicable. There was no sale and purchase agreement in this case and the plaintiff had been asked to affix his thumbprint at the bottom of a blank piece of paper. Furthermore, the transaction which involved the transfer of the land in question was fraught with unexplained suspicious circumstances, especially concerning the actions of Clarence Sipain and his lawyer brother, Oswald. Oswald was a lawyer of 17 years standing (see para 14).

(2) No doubt the doctrine of estoppel is of wide utility but it could not be used as a convenient shield to deflect a charge of civil fraud when there is evidence that a signatory to a document had not consented to the transaction in question in the first place. The police investigations revealed that the thumbprint on the memorandum of transfer in question belonged to the plaintiff. The plaintiff gave evidence that the thumbprint of the former was affixed to a blank piece of paper. The plaintiff was a credible witness in this case. There was no reason for him to sign a memorandum of transfer at that point in time as no negotiations for the sale of his land had been concluded and no money had been paid to him. It was clear that he was tricked into affixing his thumbprint on a blank piece of paper (see para 15).

(3) The affixation of the right thumbprint of the plaintiff on the memorandum of transfer was also completely dubious and suspicious. The plaintiff told the court that the paper given to him was blank. Section 97 of the Land Ordinance (Cap 68) requires that a signature to be attested by anyone of the qualified persons listed in the section or an officer appointed by the Minister. There is also no dispute that 'signature' in s 97 should include a thumbprint. 'Signature' in the Interpretation and General Clauses Enactment 1963 includes the affixing of a mark. In the premises, the affixing of a thumbprint as a mark of verification should come within the meaning of 'signing'. Section 97 does not provide that a registration is rendered illegal or an interest is rendered defeasible if a memorandum of transfer or other instrument was not properly attested by a qualified witness. For that reason, breach of s 97 would not automatically nullify the registration. However, the fact that a registration was affected with a memorandum of transfer that was not properly attested was relevant in considering whether the transaction was tainted with fraud if there were other supporting evidence (see para 23).

(4) The first to fourth defendants were liable for committing fraud to deprive the plaintiff of his land. The primary remedy sought by the plaintiff is the return of his land. The plaintiff did not tender evidence to show that the plaintiff had lost any economic opportunity during the period he had

been deprived of the use of his land. In the premises, an order to return the land to the plaintiff and order for costs of the trial against all the defendants would more than sufficiently compensate the plaintiff for his loss (see para 31).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa tanahnya telah dipindahmilik kepada defendan pertama melalui fraud, instrumen tidak sah dan salah nyata fraud. Defendan keempat yang merupakan seorang peguam adalah saudara lelaki kepada defendan pertama. Defendan kedua dan ketiga adalah orang tengah dalam transaksi jual beli itu. Plaintif turut memplidkan bahawa terdapat kegagalan balasan kerana defendan pertama tidak membayar harga belian yang dikatakan itu. Plaintif juga memplidkan kecuaian terhadap defendan kelima yang dikatakan mengesahkan cap ibu jarinya pada memorandum pindahmilik. Defendan keenam disaman kerana dia merupakan majikan kepada defendan kelima. Defendan ketujuh disaman kerana permohonan untuk pemindahan semula tanah. Plaintif memberi keterangan bahawa dia tidak menurunkan cap ibu jarinya atas apa-apa memorandum pindahmilik. Pada Ogos 2013, anak saudaranya, defendan kedua, memberitahu kepadanya bahawa Tan Sri Richard Malanjum orang yang dikenalinya mahu membeli tanahnya. Dia memberikan surat ikatan hakmilik kepada defendan kedua dengan arahan untuk tidak melepaskannya sehingga bayaran penuh dibayar. Pada hari yang sama, defendan kedua meminta plaintif menurunkan cap ibu jarinya pada satu dokumen kosong dan menyatakan ia adalah untuk tujuan pemindahan bayaran deposit ke dalam akaunnya. Plaintif bersetuju kerana dia telah diberitahu bahawa pembeli adalah Tan Sri Richard Malanjum. Plaintif memberitahu defendan kedua untuk tidak menjual tanah itu untuk apa-apa harga di bawah RM1.65 juta. Kemudian dia mendapati bahawa hanya RM50,000 telah didepositkan ke dalam akaunnya. Dia juga mendapati bahawa tanah itu telah dipindahmilik kepada Clarence Sipain. Pada masa yang sama dia juga tidak dapat menghubungi anak saudaranya, defendan kedua. Plaintif membuat laporan polis untuk mengadu bahawa dia telah ditipu. Dia memasukkan kaveat dua hari selepas itu. Dalam tindakan ini, isu yang berbangkit adalah sama ada plaintif kehilangan tanahnya melalui fraud atau salah nyata fraud atau salah nyata kecuaian; sama ada surat ikatan hakmilik Clarence Sipain adalah tidak boleh sangkal dan sama ada, secara alternatif, terdapat kegagalan balasan di pihak Clarence Sipain.

Diputuskan:

(1) Keterangan plaintif bahawa dia tidak menurunkan cap ibu jari kanannya atas memorandum pindahmilik bercetak dalam kes ini adalah boleh dipercayai. Pembelaan *non est factum* tidak terpakai. Tiada perjanjian jual beli di dalam kes ini dan plaintif telah diminta untuk menurunkan cap ibu jarinya di atas sekeping kertas kosong. Tambahan lagi, transaksi yang

melibatkan pindahmilik tanah yang dipersoalkan adalah penuh dengan keadaan mencurigakan yang tidak dapat diterangkan, terutama berkaitan dengan tindakan Clarence Sipain dan abangnya yang merupakan seorang peguam, Oswald. Oswald adalah seorang peguam dengan pengalaman 17 tahun (lihat perenggan 14).

(2) Tidak syak lagi doktrin estopel memberikan kemudahan yang luas tetapi ia tidak boleh digunakan sebagai perisai yang mudah untuk menyangkal tuduhan fraud sivil apabila terdapat keterangan bahawa penandatangan kepada satu dokumen tidak membenarkan transaksi yang yang dipersoalkan itu dari mulanya. Siasatan polis mendedahkan bahawa cap ibu jari di atas memorandum pindahmilik yang dipersoalkan adalah kepunyaan plaintif. Plaintif memberi keterangan bahawa cap ibu jari yang kemudiannya telah diturunkan di atas sekeping kertas. Plaintif adalah saksi yang boleh dipercayai di dalam kes ini. Tiada sebab untuk dia menandatangani satu memorandum pindahmilik pada ketika itu kerana tiada rundingan untuk jualan tanahnya telah diputuskan dan tiada wang telah dibayar kepadanya. Ia juga adalah jelas bahawa dia telah diperdaya untuk menurunkan cap ibu jarinya di atas sekeping kertas kosong (lihat perenggan 15).

(3) Penurunan cap ibu jari kanan plaintif di atas memorandum pindahmilik adalah juga benar-benar meragukan dan mencurigakan. Plaintif memberitahu mahkamah bahawa kertas yang diberikan kepadanya adalah kosong. Seksyen 97 Ordinan Tanah (Cap 68) memerlukan satu tandatangan untuk diakusaksi oleh sesiapa sahaja orang yang layak disenaraikan dalam seksyen atau seorang pegawai yang dilantik oleh Menteri. Ia juga tidak dipertikaikan bahawa 'signature' di dalam s 97 hendaklah termasuk cap ibu jari. 'Signature' dalam Enakmen Tafsiran dan Fasal-Fasal Am 1963 termasuk menurukan satu tanda. Di dalam premis itu, penurunan satu cap ibu jari sebagai tanda pengesahan hendaklah datang dalam maksud 'signing'. Seksyen 97 tidak memperuntukkan bahawa satu pendaftaran diterjemahkan menjadi undang-undang atau satu kepentingan diterjemah menjadi tidak boleh sangkal jika memorandum pindahmilik atau instrumen lain tidak diakusaksikan dengan betul oleh saksi yang layak. Bagi tujuan itu, pelanggaran s 97 tidak secara automatik akan membatalkan pendaftaran. Walau bagaimanapun, fakta bahawa pendaftaran telah terjejeas dengan memorandum pindahmilik yang tidak disaksikan dengan betul adalah relevan dalam mempertimbangkan sama ada transaksi telah dicemari dengan fraud jika terdapat keterangan sokongan yang lain (lihat perenggan 23).

(4) Defendan pertama hingga keempat adalah bertanggungan kerana melakukan fraud menafikan plaintif atas tanahnya. Remedi utama yang dipohon oleh plaintif adalah pemulangan tanahnya. Plaintif tidak

mengemukakan keterangan untuk menunjukkan bahawa plaintif telah kehilangan apa-apa peluang ekonomi sepanjang waktu dia telah dinafikan penggunaan tanahnya. Di dalam premis itu, satu perintah untuk memulangkan semula tanah kepada plaintif dan perintah untuk kos untuk perbicaraan terhadap kesemua defendan adalah lebih dari mencukupi untuk membayar ganti rugi plaintif untuk kerugiannya (lihat perenggan 31).]

Notes

For cases on fraud alleged, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5027–5034.

Cases referred to

Assets Co Ltd v Mere Roihi [1905] AC 176, PC (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Lee Siew Ken v Pengarah Tanah Dan Galian Negeri Selangor [2015] MLJU 610; [2015] 1 LNS 1086, HC (refd)
M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Perseketuan and Ors [2012] 8 MLJ 713; [2012] 3 CLJ 271, HC (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359; [2006] 3 CLJ 770, CA (refd)
Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC (refd)

Legislation referred to

Contracts Act 1950 s 26, Illustration (f)
Interpretation and General Clauses Enactment 1963
Land Ordinance (Cap 68) ss 88, 97, 182(1)
National Land Code ss 5A, 22, Schedule 14

Marianne Ghani (Dominic Ghani with her) (James Ghani & Co) for the plaintiff.
Gilbert Bulagang (Bulagang & Co) for the first and fourth defendants.
Nor Asiah Mohd Yusof (State Attorney General of Sabah) for the fifth, sixth and seventh defendants.

Ravinthran J:

INTRODUCTION

[1] The plaintiff is an 89 year-old villager from the Penampang District of Sabah. He has alleged that his land was transferred to the first defendant through fraud, void instrument and fraudulent misrepresentation. The fourth defendant who is a lawyer is the brother of the first defendant. The second and third defendants are intermediaries in the sale and purchase transaction. Both did not defend the action. The plaintiff also pleaded that there was failure of consideration as the first defendant did not pay the alleged purchase price. In the amended statement of claim, the plaintiff also pleaded negligence against the land office supervisor ('the fifth defendant') who purported to attest his thumbprint on the memorandum of transfer. The sixth defendant, the Assistant Collector of Land Revenue, Penampang was sued because he is the employer of the fifth defendant. The seventh defendant was sued because of the prayer for re-transfer of the land. Both first and fourth defendants were represented by the same defence counsel at the trial. The representative of the Sabah Attorney General defended the action against the fifth, sixth and seventh defendants.

CLAIM OF THE PLAINTIFF

[2] Anthony bin Lojuta, the plaintiff herein, formerly owned a parcel of land measuring about two acres ('NT 213184760') held under native title in Penampang District. The memorandum of transfer that was used to transfer the land to the first defendant ('Clarence Sipain @ Clarence Mojingol') states that the consideration for the sale of the land was RM500,000. In the signature column of the transferor, there is a thumbprint instead of a signature. Anthony bin Lojuta testified that he did not affix his thumbprint on any memorandum of transfer. In August of 2013, his nephew (John Bruno), who is the second defendant, told him that a 'Tan Sri' wanted to buy his land. John Bruno also told him that the said 'Tan Sri' is Tan Sri Richard Malanjum with whom he was acquainted. He gave the title deed to John Bruno with the instruction not to release it until the full purchase price is paid. On the same day at about 1pm, John Bruno asked him to affix his right thumbprint on a blank document. John Bruno told him that it was for the purpose of transmitting the deposit payment into his account. Anthony bin Lojuta agreed because he was told that the buyer is Tan Sri Richard Malanjum. John Bruno also asked for his Alliance Bank account number. Anthony bin Lojuta told John Bruno not to sell the land for any price below RM1.65m. Later he discovered that only RM50,000 had been deposited into his account. He also discovered that the land had been transferred to Clarence Sipain. At the same time he was unable to contact his nephew, the said John Bruno. On 24 September 2013, he lodged a police report to complain that he had been defrauded and cheated. He lodged a caveat

two days later. During cross-examination, Anthony bin Lojuta denied that he had agreed to sell his land for RM500,000 to Clarence Sipain or that he had agreed to receive payment by instalments. He also said that he does not know Clarence Sipain or his brother, Oswald Sipain Mojingol. He had never met them.

[3] The only other witness for Anthony bin Lojuta was his nephew whom he had sued as the second defendant. John Bruno did not file his defence within the prescribed time and did not appoint any counsel to represent him at the trial. However, he filed his statement of defence after he was served a subpoena to testify five days before the commencement of trial. He did not seek extensionof time. Therefore, to all intents and purposes he had elected not defend the suit against him. Counsel for the first and fourth defendants did not object to the application to call John Bruno as a witness. Counsel for the plaintiff submitted that there is no legal prohibition against a plaintiff calling the defendant as his witness on the authority of *M Ratnavale v S Lourdenadin; M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371. I exercised my discretion to allow the application as John Bruno neglected to defend the claim against him and as there was no objection from any quarter including John Bruno. However, I must perforce address something raised by counsel for first and fourth defendants in the final submissions. Although, he did not object to the calling of John Bruno (second defendant) as a witness for the plaintiff, he cited the following passage from the judgment of the above mentioned case:

> For a proceeding of that nature, it would in our opinion be highly undesirable to allow the plaintiff to call the defendant after he has closed his case because his duty is to prove fraud beyond reasonable doubt against the defendant. In a case like this, we do not think it a good practice that a plaintiff should be allowed to supplement his case with the evidence of the defendant. It would indeed be a travesty of justice to allow the respondent after she had closed her case to call the second appellant to give evidence when the second appellant had elected not to give evidence but to rely on submission of no case.

[4] In my opinion, the above passage does not apply to the instant case as the plaintiff had not closed his case as yet when the application to call John Bruno was made. Furthermore, as I noted earlier, John Bruno had not elected to defend the action against him. I shall now consider his evidence.

[5] John Bruno agreed that he is the nephew of Anthony bin Lojuta. He said that he caused Anthony bin Lojuta to affix his thumbprint on the right side on a blank piece of paper. He said Avictus Lajuta @ Ronny Lajuta (the three defendant) asked him to procure the thumbprint of Anthony bin Lojuta. After obtaining the thumbprint of Anthony bin Lojuta, he went to the law firm of Oswald Sipain Mojingol (the fourth defendant). Avictus Lajuta brought him there. Avictus Lajuta told him that Oswald Sipain Mojingol is the lawyer of the

'Tan Sri'. Avictus Lajuta gave the title deed to Oswald Sipain Mojingol. John Bruno agreed to the request because Avictus Lajuta told him that it was the request of the 'Tan Sri'. Oswald Sipain Mojingol then told John Bruno to sign on three blank papers before paying him commission of RM50,000 in cash. There were two payment vouchers (pp 16 and 17 of Bundle D) that stated that he was paid a total of RM100,000. However, Oswald Sipain Mojingol paid him only RM50,000. John Bruno said that Oswald Sipain Mojingol knew that the selling price fixed by Anthony bin Lojuta was RM1.65m because he told him so. He said Avictus Lajuta and Oswald Sipain Mojingol told him that the balance would be paid within two weeks. However, Anthony bin Lojuta was only paid a total RM50,000. During cross-examination, he said that the commission was not part of the sale price. He said that he was paid only RM15,000 out of the RM50,000 commission taken by Avictus Lajuta.

DEFENCE FOR THE FIRST AND FOURTH DEFENDANTS

[6] It is common ground that the first and fourth defendants, ie Clarence Sipain and Oswald Sipain Mojingol are brothers. Clarence Sipain said that he purchased the land for RM500,000. He paid RM50,000 before the transfer of the land to him and RM100,000 after the land was transferred. He wanted to complete the purchase by paying the full price but could not do so as the landowner, Anthony bin Lojuta had lodged a police report against him after the land was transferred to him. He said that the land was transferred to him before the payment of the full purchase price as he was worried that something could happen to Anthony bin Lojuta who was 89 years old at that time. He said Anthony bin Lojuta could take action against him if he did not pay the full purchase price. He asked for six to ten months' time to pay the full purchase price. The land was introduced to him by his brother, Oswald Sipain Mojingol who also acted for him in the purchase transaction. He did not use any 'runner' to act for him. Clarence Sipain said that he never met Anthony bin Lojuta. He affirmed that he is willing to complete the purchase by paying the balance of the purchase price. During cross-examination, he agreed that he never executed a sale and purchase agreement and that the memorandum of transfer is the only document that he signed in respect of the transaction. He did not sign the document before Ali Hussin bin Taha (the fifth defendant) who is the land office supervisor who purportedly attested his signature. He also agreed that the memorandum of transfer does not say that he had ten months to pay the balance of the purchase price. He said he deposited RM50,000 to the Alliance Bank account of Anthony bin Lojuta. He also agreed that one month had elapsed between the transfer of the land to him and the date when Anthony bin Lojuta lodged a police report against him. He also agreed that there is no document that states that Anthony bin Lojuta agreed for commission to be paid to John Bruno and Avictus Lajuta out of the purchase price. Clarence Sipain was queried during cross-examination why it was not stated in the payment voucher issued to John Bruno that the commission of RM50,000

paid to him was not stated to be part of the purchase price. The reply of Clarence Sipain was that he does not know and left everything to Oswald Sipain Mojingol to arrange. He insisted that he agreed to pay only RM500,000 for purchase of the land. He gave RM150,000 to Oswald Sipain Mojingol to arrange the payments for the transaction.

[7] Oswald Sipain Mojingol said that in July of 2013, Avictus Lajuta told him that there was a land was for sale at Kampung Dambai in the District of Penampang. Avictus Lajuta told him to discuss the price of the land with John Bruno who is the nephew of Anthony bin Lojuta. Oswald Sipain Mojingol's brother, Clarence Sipain was willing to buy it for RM500,000 but wanted to pay by instalments. Avictus Lajuta then brought the title deed to Oswald Sipain Mojingol's office. He brought John Bruno along. John Bruno explained that Anthony bin Lojuta was old and sickly and thus could not move around or come to the office. Oswald Sipain Mojingol said he was aware from the identity card number that Anthony bin Lojuta was of advanced age. John Bruno accepted the offer of RM500,000 for purchase of the land on behalf of Anthony bin Lojuta. Oswald Sipain Mojingol said that John Bruno told him that Anthony bin Lojuta needed money urgently for his medical bills and that he was about to see a money lender. John Bruno asked Oswald Sipain Mojingol for advance of RM150,000. Oswald Sipain Mojingol said he did not prepare the memorandum of transfer but asked John Bruno to do it. He also said John Bruno and Avictus Lajuta brought the completed memorandum of transfer to the land office for lodgment. Oswald Sipain Mojingol credited RM50,000 to the account of Anthony bin Lojuta before the transfer. After the transfer, he paid RM100,000 to Anthony bin Lojuta through John Bruno. During cross examination, he said the said payments were made to John Bruno. They were not banked into the account of Anthony bin Lojuta because of the request of John Bruno. He issued the payment vouchers because payments were made through his law firm. The payment vouchers were prepared in advance and are dated 22 August 2013. However, the two payments of RM50,000 each as stated in the payment vouchers were collected by John Bruno after the transfer of the land was made. He said he did not contact Anthony bin Lojuta because John Bruno had been 'appointed' to represent him and had possession of the title deed. During cross-examination, he agreed that John Bruno did not possess a letter or a power of attorney from Anthony bin Lojuta authorising him to accept payment for the land. But Oswald Sipain Mojingol considered the title deed that was in the possession of John Bruno as the 'authority'. As for the manner in which the land was transferred to Clarence Sipain, ie without a sale and purchase agreement and when a substantial balance of the alleged purchase price of RM500,000 was still due, he said that it is not against conveyancing practice because he said the land in question is a native title land and therefore it is a 'simple' transaction.

[8] The only witness for the fifth, sixth and seventh defendants was Ali Hussin bin Taha (the fifth defendant). His evidence was brief. At the material time he served as a land office supervisor at the Penampang District Land Office. His role in this case is that he signed as the attesting witness on the memorandum of transfer that was used to transfer the land of Anthony bin Lojuta to Clarence Sipain. However, Ali Hussin admitted that he did not actually see Anthony bin Lojuta affixing his thumbprint on the document. Neither did he see Clarence Sipain signing the memorandum of transfer. He said the memorandum of transfer was brought to him by Avictus Lajuta. Avictus Lajuta also brought photocopies of the identity card of the transferor and transferee ie that of Anthony bin Lojuta and Clarence Sipain. Avictus Lajuta also showed him a pay-in slip in respect of payment of RM50,000 made to the Alliance Bank account of Anthony bin Lojuta. He signed in the witness column of the memorandum of transfer as the attesting witness although the transferor and transferee were not present. Ali Hussin believed that the sale transaction was genuine as Avictus Lajuta showed him the payment slip evidencing payment of RM50,000 to Anthony bin Lojuta. Thus he said that he acted in good faith in the performance of his duty. He said that after the transfer was completed, the title deed was collected by Clarence Sipain. The crucial part of his evidence was as follows:

> Q: Ada apa lagi yang kamu ingin nyatakan kepada mahkamah?
>
> A: Ya. Saya membuat pengakusaksian ke atas borang MOT ini kerana saya percaya transaksi penjualan tanah ini telah selesai apabila Avictus Lajuta @ Ronnie Lojuta menunjukkan kepada saya slip kemasukan wang ke dalam akaun Anthony Lojuta, di sebabkan oleh itu saya percaya bahawa itu adalah benar dan saya dengan niat murni menjalankan tugas saya sebagai Penyelia Tanah Daerah Penampang telah membuat pengakusaksian di dalam borang MOT tersebut.
>
> Saya tidak ada niat untuk menipu kepada mana-mana pihak kerana apa yang saya buat adalah atas kepercayaan tanpa ada sebarang keraguan bahawa semua yang dikemukakan kepada saya adalah benar.

[9] During cross-examination, he admitted that the 'correct procedure' in attesting a signature is that the signatories must be present before him.

ISSUES

[10] The parties failed to submit a list of agreed issues for the trial. Having regard to the pleadings and the evidence in this case, the central issues that arise are as follows:

(a) whether Anthony bin Lojuta lost his land through fraud or fraudulent misrepresentation or negligent misrepresentation?

(b) whether Clarence Sipain's title is indefeasible? and

(c) whether, in the alternative, there was failure of consideration on the part of Clarence Sipain?

STANDARD OF PROOF

[11] Before I proceed to discuss fraud, I shall at the outset discuss the applicable standard of proof to establish fraud in a civil case. Before the Federal Court decision on 10 August 2015 in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, the position in Malaysia Law is that a plaintiff must discharge the burden of proof on the criminal standard. In other words, the standard of proof to establish fraud was beyond reasonable doubt. The standard of proof required to prove fraud in a civil case in other Commonwealth countries such as England, Canada, Australia and Singapore has all along been on a balance of probabilities. The above mentioned Federal Court case has brought the Malaysian position in line with other Commonwealth countries when it held that if fraud is the subject of a claim in civil cases, the standard of proof is on a balance of probabilities. Thus, Anthony bin Lojuta as the plaintiff in the instant case need not prove beyond reasonable doubt that he was defrauded of his property by the defendants. He only needs to prove by a preponderance of credible evidence that he was defrauded of his land by the actions of the defendants.

FRAUD AND FRAUDULENT MISREPRESENTATION

[12] In the instant case, Anthony bin Lojuta was the registered owner of the land at the material time. He has averred that he lost his land to Clarence Sipain through fraud or fraudulent misrepresentation. Clarence Sipain is now the registered owner. The essential relief sought by Anthony bin Lojuta is the return of the land. The secondary relief is for damages. Section 88 of the Land Ordinance (Cap 68) does not provide for the concept of indefeasibility in Sabah, either immediate or deferred as noted in the case of *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173. It does not mention or define 'fraud'. Fraud is mentioned as a ground for vitiating title under National Land Code but it is not defined either. However, it has been stated on high authority that the definition of fraud in Torrens jurisdictions would necessarily include some sort of dishonesty (see *Assets Co Ltd v Mere Roihi* [1905] AC 176 (per Lord Lindley). The above mentioned case was cited in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 by Edgar Joseph Jr FCJ. In the case of *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196, Lee Hun Hoe CJ cited the Privy Council case of *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 and

said that fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person isdeprived of his existing right. Anthony bin Lojuta had also pleaded fraudulent misrepresentation. In *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359; [2006] 3 CLJ 770, the Court of Appeal described the tort of fraudulent misrepresentation as follows:

> Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim the respondent in this case need to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation the respondent had suffered damage. For the elements of the tort of deceit see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405.

CLAIM OF FRAUD AGAINST THE FIRST TO FIFTH DEFENDANTS?

[13] In para 12 of the statement of claim, Anthony bin Lojuta had pleaded fraud against all the defendants. I shall first consider whether Anthony bin Lojuta was divested of his land by the fraudulent actions of Clarence Sipain, John Bruno, Avictus Lajuta and Oswald Sipain Mojingol (the first, second, third and fourth defendants herein). The role of Ali Hussin (the fifth defendant) shall be considered later.

ROLE OF THE FIRST TO FOURTH DEFENDANTS

[14] To recapitulate, Anthony bin Lojuta has alleged that he was cheated of his land because the name of Tan Sri Richard Malanjum was used by the defendants and because his thumbprint was procured on a blank piece of paper by John Bruno. Anthony bin Lojuta said that John Bruno who is his nephew told him that Tan Sri Richard Malanjum was interested in buying his land. He trusted John Bruno and gave the title deed to him. Furthermore, he knew Tan Sri Richard Malanjum. Anthony bin Lojuta cautioned John Bruno that he did not want to sell his land for any price less than RM1.65m. On the same day, John Bruno asked him to place his right thumbprint on a blank paper. He was certain that the paper was blank as he could see that nothing was written on it. The ostensible reason given to him by John Bruno for securing his right thumbprint was for payment of deposit to be made into his bank account. John Bruno who testified on behalf of Anthony bin Lojuta confirmed that it was Avictus Lajuta who asked him to obtain the right thumbprint of Anthony bin Lojuta on the right side of a blank paper. Avictus Lajuta gave him the blank paper. John Bruno was very certain that nothing was written on the paper. John Bruno also agreed that Anthony bin Lojuta told him to sell the land for RM1.65m. Avictus Lajuta then brought John Bruno to the law office of Oswald Sipain Mojingol. John Bruno had the title deed and the blank paper with the signature of Anthony bin Lojuta with him. He told Avictus Lajuta and

Oswald Sipain Mojingol that his uncle, Anthony bin Lojuta wanted to sell the land for RM1.65m. He said they agreed to the said price. Avictus Lajuta introduced Oswald Sipain Mojingol to him as Tan Sri Richard Malanjum's lawyer. The title deed was then handed over to Oswald Sipain Mojingol. For his trouble, John Bruno was paid a commission of RM50,000 in cash by Oswald Sipain Mojingol who asked him to sign some vouchers. The defence of Clarence Sipain and Oswald Sipain Mojingol is that Anthony bin Lojuta sold his land for the sum of RM500,000. Clarence Sipain said that he is willing to pay the balance of RM350,000 that is due to Anthony bin Lojuta. I find that Anthony bin Lojuta had given credible evidence that he did not sell his land to Clarence Sipain for the sum of RM500,000 in the first place. Anthony bin Lojuta told the court that he could read and write a little. He is able to sign his name. In a previous land transaction that he entered into, he said that he signed his name on the memorandum of transfer. He did not place his right thumbprint. He had also signed a 'Surat Perjanjian' in respect of the previous transaction. The evidence on this point was not challenged by counsel for the first and fourth defendants. Therefore, Anthony bin Lojuta's evidence that he did not place his right thumbprint on a printed memorandum of transfer form in the instant case is credible. For this reason the defence of *non est factum* submitted by counsel for the first and fourth defendants is not applicable. There was no sale and purchase agreement in this case and the plaintiff had been asked to affix this thumbprint at the bottom of a blank piece of paper. Furthermore, the transaction which involved the transfer of the land in question is fraught with unexplained suspicious circumstances, especially concerning the actions of Clarence Sipain and his brother, Oswald Sipain Mojingol. Oswald Sipain Mojingol is a lawyer of 17 years standing. Clarence Sipain told the court that he left the matter of the purchase of the land in question to his brother, Oswald Sipain Mojingol. It is undisputed in the instant case that both Clarence Sipain and Oswald Sipain Mojingol never met Anthony bin Lojuta to inquire whether he wanted to sell the land in question. It is also undisputed that no sale and purchase agreement was prepared by Oswald Sipain Mojingol in respect of the sale of the land in question. Oswald Sipain Mojingol told the court that it was unnecessary as the sale of a native land is a 'simple' transaction despite the fact that he claimed that the sale price was a huge sum, ie RM500,000. I am of the view that the answer of Oswald Sipain Mojingol that the sale of a native land is a 'simple' transaction and that is the reason that no sale and purchase agreement was prepared is suspicious. It may well be that if laymen were involved, the absence of a sale and purchase agreement will not be very surprising. However, in the instant case, Oswald Sipain Mojingol is a practising lawyer and the title deed was brought to his office not by the owner of the land but by a third party, ie John Bruno. John Bruno did not possess a power of attorney or at least a letter of authorisation from Anthony bin Lojuta. In the premises, common sense and ordinary prudence dictated that Oswald Sipain Mojingol should have taken steps to inquire whether the aged Anthony bin Lojuta had agreed to sell his land. After

all, Oswald Sipain Mojingol told the court during cross-examination, that from the identity card number of Anthony bin Lojuta, he figured out that he is of advanced age, ie 89 years. It must also not be forgotten that his brother, Clarence Sipain appears to have entrusted the purchase of the land to him. However, Oswald Sipain Mojingol was apparently not bothered at all that the 89-year old land owner was not before him and that he had not given a power of attorney or letter of authorisation to his alleged intermediary, John Bruno. All that the intermediary (John Bruno) had with him was the title deed to the land, photocopy of the land owner's identity card and a thumbprint on a blank piece of paper. When queried during cross-examination about any evidence that supports the defence that Anthony bin Lojuta had authorised John Bruno to the sell his land, Oswald Sipain Mojingol shockingly told the court that the fact of possession of the title deed by John Bruno is the 'authority'. Thus Oswald Sipain Mojingol had purported to enter into a sale and purchase agreement on behalf of his brother by merely sighting the title deed, the memorandum of transfer and the photocopy of the identity card without ever having met the land owner or inquiring whether John Bruno was properly authorised to represent him. This answer means that in a hypothetical situation, a burglar could steal a title deed and procure a thumbprint from a sleeping or unconscious land owner and Oswald Sipain Mojingol who is a qualified lawyer would be satisfied that the land owner had consented to the transfer of his land without further inquiry.

DOCTRINE OF ESTOPPEL

[15] In fact, it was submitted on behalf of Oswald Sipain Mojingol and Clarence Sipain that the doctrine of estoppel applies against Anthony Lojuta merely because he had given his title deed to John Bruno and had signed either a blank paper or blank memorandum of transfer form. With respect, I am not persuaded by this submission. No doubt the doctrine of estoppel is of wide utility but it cannot be used as a convenient shield to deflect a charge of civil fraud when there is evidence that a signatory to a document had not consented to the transaction in question in the first place. I am also mindful that in this case, the police investigations revealed that the thumbprint on the memorandum of transfer in question belonged to Anthony bin Lojuta. However, Oswald Sipain Mojingol also agreed to the suggestion during cross-examination that a memorandum of transfer form which is stored digitally in computers could have been printed on to the blank paper with the said thumbprint. As I said earlier, Anthony bin Lojuta and John Bruno gave evidence that the thumbprint of the former was affixed to a blank piece of paper which was given by Avictus Lajuta. I find that Anthony Lojuta is a credible witness in this case. There is no reason for him to sign a memorandum of transfer at that point in time as no negotiations for the sale of his land had been concluded and no money had been paid to him. It is clear that he was tricked into affixing his thumbprint on a blank piece of paper by his nephew who was

instigated by Avictus Lajuta. Oswald Sipain Mojingol had obviously aided their fraudulent purpose when they came to his office.

LODGMENT OF MEMORANDUM OF TRANSFER

[16] Ali Hussin (the fifth defendant) is the land office supervisor who purportedly attested the memorandum of transfer. He said that it was not brought to him by Anthony bin Lojuta but by a third party, ie Avictus Lajuta. In the premises, even if it is accepted that Anthony bin Lojuta had affixed his right thumbprint on a blank memorandum of transfer form, Oswald Sipain Mojingol would have known that the said memorandum of transfer form that was given to him was not properly attested in accordance with s 97 of the Land Ordinance (Cap 68) by an authorised witness. The memorandum of transfer had not been signed by Ali Hussin as yet at that point in time. However, Oswald Sipain Mojingol proceeded to issue vouchers for two payments of RM50,000 to John Bruno. John Bruno claimed that only RM50,000 in cash was paid to him. Be that as it may, Oswald Sipain Mojingol did absolutely nothing to inquire about the intention of Anthony bin Lojuta to sell the land in question in the first place. In respect of the lodgment of the memorandum of transfer at the land office, Oswald Sipain Mojingol told the court that it was not done by him but by Avictus Lajuta. However, it can be easily inferred that Oswald Sipain Mojingol was involved in the lodgment of the memorandum of transfer at the land office for the following reason. The title deed and the memorandum of transfer form or the blank paper with the thumbprint were brought to the law firm of Oswald Sipain Mojingol. However, he told John Bruno to handle the lodgment of the memorandum of transfer at the land office. This is what he said in his witness statement:

> Q 13: Did you prepare any sale and purchase agreement and memorandum of transfer for the sale of Anthony bin Lojuta's land to your brother, Clarence Sipain @ Clarence Mojingol?
>
> A: *No. I told John Bruno to do the transfer on his own* as he was the one appointed by Anthony bin Lojuta to sell the land. My brother Clarence Sipain @ Clarence Mojingol will pay part of the advance payment of RM150,000 amounting to RM50,000 before the transfer and the remaining RM100,000 after the transfer. (Emphasis added.)

[17] John Bruno told the court that he did not take the title deed with him or lodge any memorandum of transfer at the land office. He said the title deed was taken by Avictus Lajuta. This is corroborated by Ali Hussin who said that Avictus Lajuta brought the title deed and a memorandum of transfer form to his office to be attested. It must be recalled that the title deed was brought to the law firm of Oswald Sipain Mojingol. Payment vouchers were issued under name of the law firm of Oswald Sipain Mojingol. Yet, Oswald Sipain Mojingol saw fit to exhort John Bruno to bring the title deed and memorandum of

transfer to the land office. The only inference that can be drawn from the actions of Oswald Sipain Mojingol is that he knew that he was a participant in a fraudulent transaction and wanted limit the involvement of his law firm by shrewdly requesting John Bruno to bring the memorandum of transfer to the land office for attestation and lodgment.

POLICE REPORTS

[18] Counsel for first and fourth defendants urged the court to consider the evidence that Anthony bin Lojuta was not aware of the role of Oswald Sipain Mojingol. Anthony bin Lojuta told the court that it was John Bruno and Clarence Sipain who had cheated him. Counsel for first and fourth defendants also highlighted the fact that Anthony bin Lojuta did not lodge a police report against Oswald Sipain Mojingol but only against Clarence Sipain and Avictus Lajuta. This argument has no merit. The plaintiff had pleaded conspiracy to commit fraud against the first to fourth defendants. In the premises, even if the hand of a co-conspirator is not seen by the victim, he is nonetheless also responsible for the misdeed. In the io instant case, Oswald Sipain Mojingol in his capacity as a lawyer had clearly played a crucial role in the fraud perpetrated on the plaintiff. And the burden in a civil case is the ordinary civil standard of balance of probabilities which has clearly been discharged by the plaintiff. As for the police reports, it is only for the purpose of initiating criminal investigations. The failure to lodge a police report does not mean that a civil action has no basis. The allegations of Anthony bin Lojuta in the police report against Avictus Lajuta which were not repeated during trial are also not relevant. What is relevant is whether Anthony bin Lojuta as the plaintiff in a civil action had proved his pleaded case on a balance of probabilities.

ALLEGED INSTALMENT PAYMENTS

[19] The evidence shows that Clarence Sipain was closely involved in the actions of Oswald Sipain Mojingol. He was not present in the law firm of Oswald Sipain Mojingol when John Bruno brought the title deed. However, Clarence Sipain said Oswald Sipain Mojingol acted on his behalf in the purchase of the land. He said as follows in his brief witness statement:

> Q 10: Did you get any help in buying the land from Anthony bin Lojuta?
>
> A: Yes. Oswald Sipain Mojingol introduced the land to me. He is my brother. He acted for me.

[20] He also said that he made the payments of RM50,000 before the transfer was registered at the land office and a further RM100,000 after registration. At the same time, even if it is true that the sale price was RM500,000, he only paid RM50,000 before the transfer and another RM100,000 after the transfer. Even one month after the transfer, the balance

was not paid. In his evidence, he agreed that there was no sale and purchase agreement and that he never met Anthony bin Lojuta regarding the sale. His reason for paying only RM150,000 was that he was allowed to pay the purchase price by way of six to ten instalments. He said as follows:

> Q 9: Why was the full price not paid after the transfer of the land to you?
>
> A: I asked for a flexible arrangement to pay the balance between 6 to 10 months after the transfer of the land to me in August 2014. If I am able I will pay the balance as early as possible.

[21] However, he agreed that such an indulgence was not stated in the memorandum of transfer and that there was no sale and purchase agreement to boot. Clarence Sipain also told the court that he wanted the transfer to be completed soon in case something happened to Anthony bin Lojuta as he is of advanced age. He said as follows:

> Q 7: Why was the land transferred to you before payment of the full price?
>
> A: It is just for precaution to avoid any problem in case something happened to Anthony bin Lojuta. Anthony bin Lojuta can take action against me if I don't pay the full price. At that time I was also in the process of selling my land Register of Native Title Serial No 10893 at Kg Nambazan, District of Penampang. There was a slight delay in the sale. I have to take legal action to remove some trespassers from the land. I can pay the full price.

[22] However, at the same time, it is the case of Clarence Sipain and Oswald Sipain Mojingol that Anthony bin Lojuta wanted to sell his land because he urgently needed money for expenses and was about to go to a money lender. In the premises, it is ridiculous that Anthony bin Lojuta could have agreed through John Bruno to give six to ten months' time to the buyer for payment of the purchase price. The only inference that can be drawn is that Anthony bin Lojuta never agreed to sell his land in the first place to Clarence Sipain for the sum of RM500,000.

BREACH OF S 97 OF THE LAND ORDINANCE (CAP 68)

[23] The affixation of the right thumbprint of Anthony bin Lojuta on the memorandum of transfer is also completely dubious and suspicious. Anthony bin Lojuta told the court that the paper given to him was blank. Section 97 of the Land Ordinance (Cap 68) requires that a signature to be attested by anyone of the qualified persons listed in the section or an officer appointed by the Minister. There is no dispute that Ali Hussin (the fifth defendant) who is a land office supervisor with the lands and surveys department is such a person. There is also no dispute that 'signature' in s 97 should include a thumbprint. 'Signature' in the Interpretation and General Clauses Enactment 1963 includes the affixing of a mark. In the premises, the affixing of a thumbprint as

a mark of verification should come within the meaning of 'signing'. Ali Hussin purported to attest the right thumbprint of Anthony bin Lojuta. However, Ali Hussin agreed that Anthony bin Lojuta did not come before him for the memorandum of transfer to be attested as required by s 97. He said Avictus Lajuta came before him with the said memorandum of transfer. Ali Hussin agreed that Avictus Lajuta did not bring with him a power of attorney or even a sale and purchase agreement as proof of the consent of the land owner. He was only shown a bank pay-in slip that indicated that some payment had been made to the bank account of the land owner. Section 97 does not provide that a registration is rendered illegal or an interest is rendered defeasible if a memorandum of transfer or other instrument was not properly attested by a qualified witness. For that reason, I am not prepared to hold that breach of s 97 would automatically nullify the registration. However, in my view, the fact that a registration was effected with a memorandum of transfer that was not properly attested is relevant in considering whether the transaction is tainted with fraud if there are other supporting evidence.

SUMMARY OF EVIDENCE AGAINST THE FIRST TO FOURTH DEFENDANTS

[24] In the instant case, I have already adverted to the highly suspicious circumstances that resulted in the transfer of the land. I have also no reason not to believe that Anthony bin Lojuta who gave evidence that he would not have parted with the title deed if not for the fact that he was misled into believing that Tan Sri Richard Malanjum wanted to buy his land. John Bruno was told by Avictus Lajuta that Oswald Sipain Mojingol acted for Tan Sri Richard Malanjum. This happened in the law firm of Oswald Sipain Mojingol. Oswald Sipain Mojingol did not contradict the apparent false representation of Avictus Lajuta. Thus, it is my finding that representation was false and was fraudulently made to induce Anthony bin Lojuta to give his title to John Bruno. From the evidence that I summarised earlier, it is evident that John Bruno, Avictus Lajuta and Oswald Sipain Mojingol had misled Anthony bin Lojuta. They could not have succeeded in their mission to defraud Anthony bin Lojuta of his land without a buyer. It is undisputed that the buyer is the brother of Oswald Sipain Mojingol. For reasons given earlier, it can be inferred that Oswald Sipain Mojingol knew that Anthony bin Lojuta did not give consent to the sale. Thus by paying commission to John Bruno who shared it with Avictus Lajuta, it can be inferred that Oswald Sipain Mojingol has colluded in the scheme to defraud Anthony bin Lojuta of his land. However, the main beneficiary of this scheme is Clarence Sipain. He admitted that he knew that there was no sale and purchase agreement and that he never met Anthony bin Lojuta. He also admitted that he did not attest his own signature before Ali Hussin either. Thus it can be inferred that Clarence Sipain also played a crucial role in the fraudulent transaction. Even if it were otherwise and the plaintiff failed to prove fraud against Clarence Sipain personally, as s 88 of the Land Ordinance

(Cap 68) does not confer either immediate or deferred indefeasibility, the transfer of the land to him can be voided as it has been proven that transfer transaction is tainted with fraud.

CONSIDERATION

[25] Counsel for the plaintiff submitted that the land in question which is about ten minutes drive from the town of Donggongon is worth much more than RM500,000. However, expert evidence was not tendered to prove this fact. Even if it were so, under Malaysian law, consideration need not be adequate (see s 26 of the Contracts Act 1950, illustration (f)). Counsel for the plaintiff also submitted that there was substantial failure of consideration in this case. In my opinion, there is merit in this point and it strongly suggests that Clarence Sipain and Oswald Mojingol had intended to cheat Anthony bin Lojuta from the io outset. It is the defence of Clarence Sipain and Oswald Sipain Mojingol that Anthony bin Lojuta had, through John Bruno, agreed to sell his land for RM500,000. However, first defendant agreed that he had not paid the full purchase price at the time the land was transferred to him. Anthony bin Lojuta told the court that only RM50,000 was credited to his account and his evidence was not challenged. In fact, Clarence Sipain and Oswald Sipain Mojingol also said that only RM50,000 was credited into the bank account of Anthony bin Lojuta. However, they also said that RM100,000 had been paid as commission to John Bruno which apparently came out of the purchase price. Even if Clarence Sipain and Oswald Sipain Mojingol are to be believed on this point, only RM150,000 out of the alleged purchase price of RM500,000 had been paid to the seller. Both Clarence Sipain and Oswald Sipain Mojingol said that the balance could not be paid because the seller, ie Anthony bin Lojuta had lodged a police report against them. This assertion is difficult to believe as the police report was only lodged about a month after the land was transferred to Clarence Sipain. Thus, after having ensured that the land was transferred to him, Clarence Sipain who alleged that he bought the land for RM500,000 did not bother to pay the balance. As a defence, Oswald Sipain Mojingol also said that John Bruno had agreed for the purchase price to be paid by six to ten instalments. This assertion flies in the face of his own evidence. Both brothers were apparently conscious of the fact that the seller was old and that it is prudent to complete the transaction as soon as possible. By the same token, it is unbelievable that the 89-year old seller would have given six to ten months instalments for payment of the balance of the purchase price as he wanted money urgently. It is obvious that both Clarence Sipain and Oswald Sipain Mojingol had not been truthful. It is also not disputed that the Alliance Bank account of Anthony bin Lojuta was given to Oswald Sipain Mojingol. However, up to the time of trial, Clarence Sipain had not bothered to credit the balance of the purchase price although the land had been transferred to him. The police report and impending trial could not have been an impediment as there was no court order preventing him from completing the sale by paying

the full purchase price. In para 6 of the statement of defence, Clarence Sipain averred that he is a bona fide purchaser for value. However, I had found as a fact that Anthony bin Lojuta could not have given six to ten months' time for payment of the balance of the purchase price. Thus, even if it is true that Anthony bin Lojuta had agreed to sell the land for the purchase price was RM500,000, it should have been paid by the time of the transfer of the land or within a reasonable time. Furthermore, as stated earlier, Clarence Sipain and his lawyer, Oswald Sipain Mojingol had procured the transfer of the land without any proper inquiry as to the consent of the land owner. Thus, Clarence Sipain is not a bona fide purchaser for value and he is therefore a trustee for Anthony bin Lojuta.

[26] For all the above reasons, on a balance of probabilities I find that the first to fourth defendants had colluded to commit fraud to deprive the plaintiff of his land.

LIABILITY OF THE FIFTH DEFENDANT FOR FRAUD

[27] For sake of completeness, I must also address the pleading of Anthony bin Lojuta that Ali Hussin had also colluded in the fraud. There is no evidence that Ali Hussin had benefitted personally from the transfer of the land to Clarence Sipain. There is no evidence that Ali Hussin had met Clarence Sipain or Oswald Sipain Mojingol to discuss attestation of the thumbprint of Anthony bin Lojuta. The only evidence against him was that he signed on the memorandum of transfer in question as a witness to the thumbprint although Anthony bin Lojuta did not come to see him. He met Avictus Lajuta in the normal course of his work at the land office. He explained in court that he signed on the witness column because he trusted Avictus Lajuta who told him that Anthony bin Lojuta had sold his land. There is no evidence that he colluded with any of the other defendants and there is no evidence that he profited from the fraud that was committed on Anthony bin Lojuta. In the premises, there is insufficient evidence to make a finding that he was also involved in the fraudulent scheme perpetrated by Clarence Sipain, John Bruno, Avictus Lajuta and Oswald Sipain Mojingol.

NEGLIGENCE CLAIM AGAINST THE FIFTH AND SIXTH DEFENDANTS

[28] In para 24 of the statement of claim, Anthony bin Lojuta pleaded that Ali Hussin was negligent in attesting the thumbprint of Anthony bin Lojuta in the transferor column of the memorandum of transfer. Ali Hussin agreed that both the transferor (Anthony bin Lojuta) and the transferee ('the first defendant') did not appear before him when they executed the memorandum of transfer. He also agreed that the correct procedure to attest a memorandum of transfer was to require that the transferor or transferee affix their thumbprint

or sign in front of him. The only document produced by Avictus Lajuta was a bank pay-in slip and a photocopy of the identity card of the land owner. The bank pay-in slip showed that RM50,000 had been deposited into the account of the land owner. The law required the presence of the landowner under s 97 for the purpose of attestation or a valid power of attorney from the owner. In the premises, by merely acting on his belief that he could trust Avictus Lajuta, Ali Hussin had been grossly negligent and utterly reckless in performing his duty as a land office supervisor. The purpose of s 97 is not difficult to fathom and should have been obvious to Ali Hussin who is a land office supervisor. It is to prevent fraudulent dealings in land transactions. This is the reason that authorised or qualified witnesses are required to attest the signature or thumbprint of parties to a land transaction. Ali Hussin as a land office supervisor surely owed a duty to land owners such as Anthony bin Lojuta to ensure that they had genuinely consented to the sale of their land. And the surest way of doing that would be to comply with the requirement of the law by doing something as basic as properly attesting an important document such as a memorandum of transfer. Ali Hussin decided to sign the memorandum of transfer as a witness merely because a bank pay-in slip was shown to him and because Avictus Lajuta told him that the law firm of Oswald Sipain Mojingol handled the sale and purchase transaction. Avictus Lajuta did not even produce a letter from Oswald Sipain Mojingol's law firm to support his claim. In any event, it was not the function of Ali Hussin to inquire into the underlying sale and purchase transaction. He was not called to exercise any discretion under s 97. His duty was far simpler. It was to ensure that the transferor and transferee are before him when they executed the document in question. Thus, Ali Hussin had been negligent in the performance of his duty as an attesting witness. Ali Hussin also attempted to rely on the protection afforded to land officers under s 182(1) of the Land Ordinance (Cap 68). It reads as follows:

> No suit shall lie against the Director or any officer authorised by the Director or any police officer in respect of anything done or omitted to be done by him in good faith and in the intended exercise of any power conferred or performance of any duty imposed by this Ordinance.

[29] However, as noted by Gunalan Muniandy JC in the case of *Lee Siew Ken v Pengarah Tanah Dan Galian Negeri Selangor* [2015] MLJU 610; [2015] 1 LNS 1086, there is no presumption of good faith provided in a similarly worded section of the National Land Code. The officer is obliged to prove that he acted in good faith in respect of his act or omission that is called into question in the suit. In another case decided under the National Land Code, ie *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Perseketuan and Ors* [2012] 8 MLJ 713; [2012] 3 CLJ 271, the land officer erroneously issued a computerised title in the name of a party who was not the registered owner of the land. Prasad Sandosham Abraham J found that there was a breach of the provisions of the National Land Code particularly s 5A and the 14th Schedule

on the part of the land officer in question. He also found that there was no evidence to suggest that a notice had been sent to the land owner to surrender the old title in exchange for the new computerised title. His Lordship refused to permit the land officer in question to avail the immunity provided by s 22 of the National Land Code which is similar to s 182(1) of the Land Ordinance (Cap 68) on the following ground:

> I find the conduct of the officers involved shows a failure to carry out their functions correctly and can hardly be construed to have carried out their duties in good faith.

[30] In the instant case, Ali Hussin admitted that he knew that the correct procedure under s 97 of the Land Ordinance (Cap 68) is for the transferor and transferee to execute the memorandum of transfer before him. However, he disregarded the provision completely and decided to act on a hunch that Avictus Lajuta can be trusted. In other words, Ali Hussin had deliberately flouted the requirement of a statutory provision. For this reason, I hold that he is not entitled to the immunity afforded by s 182(1). In the premises, I am satisfied that there is sufficient evidence to make a finding on a balance of probabilities that Ali Hussin was negligent in the performance of his duties and that Anthony bin Lojuta lost his land as a consequence of his negligence. For this reason, I find that the sixth defendant who is the employer is vicariously liable as well.

CONCLUSION

[31] Having regard to my findings, I find the first to fourth defendants are liable for committing fraud to deprive the plaintiff of his land. I also find that Ali Hussin was negligent in the performance of his statutory duty and that it directly caused loss to the plaintiff. However, I see no reason to order assessment of damages for negligence against Ali Hussin or his employers for the following reasons. The primary remedy sought by the plaintiff is the return of his land. Counsel for the plaintiff did not tender evidence to show that the plaintiff had lost any economic opportunity during the period he had been deprived of the use of his land. Counsel for the plaintiff, in fact, submitted that land prices in Penampang District had appreciated. In the premises, an order to return the land to the plaintiff and order for costs of the trial against all the defendants would more than sufficiently compensate the plaintiff for his loss. I shall therefore make the following orders:

(a) I declare that the transfer of NT 213184760 registered under memorial No 2110015957 dated 23 August 2014 for the alleged transfer of the said land to the first defendant is declared fraudulent and therefore null and void;

(b) the first defendant is ordered within two weeks of the service of the sealed order to surrender the title deed No NT 213184760 to the plaintiff's solicitor;

(c) the sixth and seventh defendants to expeditiously effect the transfer of the said land NT 213184760 to the plaintiff;

(d) the plaintiff is ordered to refund to the first defendant the sum of RM50,000 deposited into his bank account by the first defendant upon re-transfer of NT 213184760 to him;

(e) the first and fourth defendants to pay costs of RM50,000 jointly to the plaintiff;

(f) the second and third defendants to pay costs of RM5,000 each to the plaintiff; and

(g) the fifth, sixth and seventh defendants to pay costs of RM5,000 jointly to the plaintiff.

Ordered accordingly.

Reported by Afiq Mohamad